

1921

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## Recommended Citation

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# MINNESOTA LAW REVIEW

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Vol. 6

DECEMBER, 1921

No. 1

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## SUPREME COURT DECISIONS ON FEDERAL POWER OVER COMMERCE, 1910-1914 I

By THOMAS REED POWELL\*

THIS paper and two to follow aim to present narratively such controversies over congressional power under the commerce clause as were adjudicated by the Supreme Court of the United States during the four terms of court beginning in October, 1910, and ending in June, 1914. To these are added the story of exercises of commerce power that were alleged to offend against constitutional limitations on the national government in favor of individual liberty and property. Mention is made, too, of the more important interpretations of the scope and effect of the acts of Congress under review. The footnotes assemble references to articles and notes in legal periodicals during the quadrennium of the cases treated in the text. References appended to the citations of the Supreme Court cases are to discussions of those decisions or of the same cases or similar ones in other courts. References to other law-review material on congressional power over commerce are subjoined to such more or less appropriate places in the text as can be discovered. The four years from 1910 to 1914 are chosen not for any intrinsic significance but because the decisions of later years have been reviewed elsewhere<sup>1</sup> and it is convenient at this time to fill in the gaps of the work of the court under Chief Justice White. The method of treatment is ex-

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<sup>1</sup>Review of Supreme Court decisions from 1914 to 1921 appear in 12 Am. Pol. Sci. Rev. 17-49, 427-457, 640-666, 13 Am. Pol. Sci. Rev. 47-77, 229-250, 607-633, 14 Am. Pol. Sci. Rev. 53-73, 19 Mich. L. Rev. 1-34, 117-151, 283-323, and 20 Mich. L. Rev. 1-23. Reviews of Supreme Court decisions from 1910 to 1914 on state power over interstate and foreign commerce are begun in the current issue of the Columbia Law Review (December, 1921) and will be continued in succeeding issues.

pository only and not critical. This method is chosen, not from motives of modesty, but from a persuasion that there are advantages in allowing the Supreme Court to speak for itself and in leaving the reader to form his own judgments as to the merits of the results reached and of the reasons advanced in their support. Those who yearn to know what others have thought about it will find ample scope for their energies if they follow the trails pointed out in the references in the footnotes.<sup>2</sup>

## I. COMMERCE AMONG THE SEVERAL STATES

### 1. *The Interstate Commerce Act and Its Amendments*

The authority to remove discriminations which was vested in the Interstate Commerce Commission by the Interstate Commerce Act of February 4, 1887, was held validly exercised in two cases against the objection that the subject matter regulated was not interstate commerce and so not within the control of the federal government. In *Southern Pacific Terminal Co. v. Interstate Commerce Commission*<sup>3</sup> one Young was the lessee of a pier and facilities of a terminal company under a contract whereby the payment of this stipulated rent relieved him from any other wharfage or terminal charges. Young bought raw materials in Texas and other states, shipped them to this wharf in Galveston where he transformed them into the finished product which he shipped to foreign ports on vessels loading at the wharf. This manufacture or concentration at the wharf was held to be but an incident in the whole process of buying supplies outside of Texas and shipping

<sup>2</sup>For articles on various aspects of the general problem of the relation between federal and state power over commerce see O. W. Catchings, "Recent Exercise of Federal Power Under The Commerce Clause of The Constitution," 1 Va. L. Rev. 44; Frederick H. Cooke, "Nature and Scope of the Power of Congress to Regulate Commerce," 11 Colum. L. Rev. 51, "The Source of Authority to Engage in Interstate Commerce," 24 Harv. L. Rev. 635; "The Gibbons v. Ogden Fetish," 9 Mich. L. Rev. 324, "The Use and Abuse of the Commerce Clause," 10 Mich. L. Rev. 93, "The Pseudo-Doctrine of the Exclusiveness of the Power of Congress to Regulate Commerce," 20 Yale L. J. 297, and "The Right to Engage in Interstate Transportation," 21 Yale L. J. 207; Ernst Freund, "Unifying Tendencies in American Legislation," 22 Yale L. J. 96; Frank B. Kellogg, "Federal Incorporation and Control," 20 Yale L. J. 177; Edward Lindsay, "Wilson Versus The 'Wilson Doctrine,'" 44 Amer. L. Rev. 641; Joseph R. Long, "Unconstitutional Acts of Congress," 1 Va. L. Rev. 417; Victor Morawetz, "The Power of Congress to Enact Incorporation Laws and to Regulate Corporations," 26 Harv. L. Rev. 667; Charles W. Needham, "The Exclusive Power of Congress Over Interstate Commerce," 11 Colum. L. Rev. 251; Max Pam, "Powers of Regulation Vested in Congress," 24 Harv. L. Rev. 182; and Dorrance Dibell Snapp, "National Incorporation," 5 Ill. L. Rev. 414. In 5 Ill. L. Rev. 57, 123 various articles on interstate commerce are reviewed and criticized by Henry Schofield.

<sup>3</sup>(1911) 219 U. S. 498, 55 L. Ed. 310, 31 S. C. R. 279.

them through Texas to foreign points. The fact that the shipment was not on through bills of lading was held to make no difference. The contention that the lessor terminal company was not a public carrier was put to one side by pointing out that its entire stock was owned by a railroad company and that it owned the only track facilities for movement of cars to or from the ships, from or to the railroads leading to the pier. The pier and the railroads were united into and managed as an organized system. Young enjoyed preferential facilities which competing shippers were denied and these facilities were facilities of interstate commerce and so within the regulatory power of the national government.<sup>4</sup>

*Houston, East & West Texas Railway Co. v. United States*,<sup>5</sup> commonly called the *Shreveport Rate Case*, sustained an order of the Interstate Commerce Commission requiring certain railroads running between Louisiana and Texas points to remove discrimination against interstate commerce by raising rates for local transportation between Texas points. The Texas rates had been fixed by the Texas commission and so far as appears were remunerative. The rates from Louisiana to Texas had been approved by the Interstate Commerce Commission as not unreasonable. They were, however, higher in proportion to distance than the local Texas rates and therefore operated to the disadvantage of Louisiana communities. Or, put in another way, the Texas rates were lower in proportion to distance than the interstate rates and therefore operated to the advantage of Texas communities. In support of the decision that the roads should remove the discrimination by

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<sup>4</sup>For decisions that certain transportation though in some aspects only between two points in the same state is in reality an integral part of an interstate shipment and that therefore orders of state commissions are not applicable thereto, see *Railroad Commission v. Worthington*, (1912) 225 U. S. 101, 56 L. Ed. 104, 32 S. C. R. 653, commented on in 11 Mich. L. Rev. 593; *Texas & N. O. R. Co. v. Sabine Tram. Co.*, (1913) 227 U. S. 111, 57 L. Ed. 442, 33 S. C. R. 229, commented on in 26 Harv. L. Rev. 554 and 11 Mich. L. Rev. 593; and *Railroad Commission v. Texas & P. R. Co.*, (1913) 229 U. S. 336, 57 L. Ed. 1215, 33 S. C. R. 837, commented on in 2 Georgetown L. J. 23.

<sup>5</sup>(1914) 234 U. S. 342, 58 L. Ed. 1341, 34 S. C. R. 833. See 2 Calif. L. Rev. 482, 14 Colum. L. Rev. 583, 607, 9 Ill. L. Rev. 276, and Henry Wolf Bickel, "Federal Control of Intra-State Railroad Rates," 63 U. Pa. L. Rev. 1; William C. Coleman, "The Evolution of Federal Regulation of Intra-State Rates," 28 Harv. L. Rev. 34; and John S. Sheppard, Jr., "Another Word About the Evolution of the Federal Regulation of Intra-State Rates," 28 Harv. L. Rev. 294. In 26 Harv. L. Rev. 757 is a consideration of a decision on the same question in the Commerce Court.

charging higher intra-state rates in Texas than those authorized by the Texas Commission, Mr. Justice Hughes said:

"It is unnecessary to repeat what has frequently been said by this court with respect to the complete and paramount character of the power confided to Congress to regulate commerce among the several states. It is of the essence of this power, that, where it exists, it dominates. Interstate trade was not left to be destroyed or impeded by the rivalries of local government. . . .

"Congress is empowered to regulate,—that is, to provide the law for the government of interstate commerce: to enact 'all appropriate legislation' for its 'protection and advancement . . .'; to adopt measures 'to promote its growth and ensure its safety, . . .'; 'to foster, protect, control, and restrain . . .' Its authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance. . . . Wherever the interstate and intra-state transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the state, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority, and the state, and not the nation, would be supreme within the national field.<sup>6</sup>

On the effect of congressional action on inconsistent state action the learned Justice observed:

"Nor can the attempted exercise of state authority alter the matter, where Congress has acted, for a state may not authorize the carrier to do what Congress is entitled to forbid and has forbidden.

"It is to be noted . . . that the power to deal with the relation between the two kinds of rates, as a relation, lies exclusively with Congress. It is manifest that the state cannot fix the relation of the carrier's interstate and intra-state charges without directly interfering with the former, unless it simply follows the standard set by federal authority. . . .

"It is also clear that, in removing the injurious discriminations against interstate traffic arising from the relation of intra-state to interstate rates, Congress is not bound to reduce the latter below what it may deem to be a proper standard, fair to the carrier and to the public. Otherwise it could prevent the injury to interstate commerce only by the sacrifice of its judgment as to interstate rates. Congress is entitled to maintain its own standard

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<sup>6</sup>(1914) 234 U. S. 342, 350-352.

as to these rates, and to forbid any discriminatory action by interstate carriers which will obstruct the freedom of movement of interstate traffic over their lines in accordance with the terms it establishes.”<sup>7</sup>

The opinion further declared that the power of Congress may be delegated to the Interstate Commerce Commission. The contention of the roads that Congress had not done so was predicated on a clause in the Interstate Commerce Act providing that the Act should not apply to the transportation of property wholly within one state. Mr. Justice Hughes got around this by saying that the commission dealt with the relation of rates injuriously affecting interstate traffic and that the question of this relation is not simply one of transportation “wholly within one state.” The proviso refers to exclusively intra-state traffic, “separately considered; to the regulation of domestic commerce, as such. The powers conferred by the act are not thereby limited where interstate commerce itself is involved.” Justices Lurton and Pitney dissented, but without opinion.

Among the complaints against the enforcement of a reparation order issued by the Interstate Commerce Commission for charging and collecting unreasonable rates, which came before the court in *Baer Bros. Mercantile Co. v. Denver & R. G. R. Co.*<sup>8</sup> was the contention that, since the transportation in question was between two Colorado points, it was not within the jurisdiction of the federal commission. But the court found that the carriage was part of a through shipment from Missouri and held that “its interstate character could not be destroyed by ignoring the points of origin and destination, separating the rate into its component parts, and by charging local rates and issuing local waybills, attempting to convert an interstate shipment into intra-state transportation.”

To this Mr. Justice Lamar added:

“That there was a common arrangement between the two carriers here was shown by the long-continued course in dealing, and the division of the freight, with the knowledge that it had been paid as compensation for the single haul. If there had been a failure on the part of one of the carriers to file the tariffs, that did not defeat the jurisdiction of the Commission to award reparation against the same carrier, when it was shown that its unreasonable charge of 45 cents per cwt. formed a part of the total rate of 90 cents per cwt. actually paid by the Baer Company.”<sup>9</sup>

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<sup>7</sup>Ibid., 353-355.

<sup>8</sup>(1914) 233 U. S. 479, 58 L. Ed. 1055, 34 S. C. R. 641.

<sup>9</sup>Ibid., 491.

The case held also that under the federal statutes the commission might issue a reparation order for past unreasonable charges without at the same time fixing a rate for the future.<sup>10</sup>

<sup>10</sup>The necessity of action by the Interstate Commerce Commission as a prerequisite to suit by a shipper for overcharges or discriminations was affirmed in several cases. The complaint in *Robinson v. Baltimore & Ohio R. Co.*, (1912) 222 U. S. 506, 56 L. Ed. 288, 32 S. C. R. 114, was of a charge of 50 cents more a ton for coal loaded from wagons than for that loaded from a tipple. Suit was brought without first getting a reparation order from the commission. The commission had in fact in other proceedings declared the discrimination to be unwarranted, but this decision had not been called to the attention of the trial court and so was dismissed from consideration on that ground and on the further one that it had not included any finding or direction as to reparation. The denial of the action was based on a previous decision with respect to an alleged excessive charge rather than a discrimination, but the court declared that the power of the commission over the two complaints is the same and that "if a court acting originally upon either, were to sustain it and award reparation, the confusing anomaly would be presented of a rate being adjudged to be violative of the prescribed standards, and yet continuing to be the legal rate, obligatory upon both carrier and shipper." Earlier in the opinion Mr. Justice Van Devanter had referred to the elaborate provisions of the act for investigations and hearings by the commission and to the prohibition against departures from the legally established rate and added:

"When the purpose of the act and the means selected for the accomplishment of that purpose are understood, it is altogether plain that the act contemplated that such an investigation and order by the designated tribunal, the Interstate Commerce Commission, should be a prerequisite to the right to seek reparation in the courts because of exactions under an established schedule alleged to be violative of the prescribed standards. And this is so, because the existence and the exercise of a right to maintain an action of that character, in the absence of such an investigation and order, would be repugnant to the declared rule that the rate established in the mode prescribed should be deemed the legal rate, and obligatory alike upon carrier and shipper until changed in the manner provided, would be a derogation of the power expressly delegated to the commission, and would be destructive of the uniformity and equality which the act was designed to secure" (222 U. S. 506, 509-510).

This case was followed in *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, (1913) 230 U. S. 247, 57 L. Ed. 1472, 33 S. C. R. 916, where the complaint was of discrimination because competing shippers had in effect been given rebates by means of unwarranted allowances for doing their own hauling from the mine to the station. The court declared that such allowances are unlawful only when unreasonable and that the question of reasonableness is primarily one for the commission. The discrimination complained of arose before the Elkins Act of 1903 which required carriers to publish their allowances for trackage or haulage services. Nevertheless Mr. Justice Pitney dissented because he thought that the decisions requiring preliminary action by the commission should be confined to cases in which the complaint is against rates duly published and approved. He dissented also in *Morrisdale Coal Co. v. Pennsylvania R. Co.*, (1913) 230 U. S. 304, 57 L. Ed. 1494, 33 S. C. R. 938, which refused to entertain a suit for an unlawful distribution of cars in the absence of a ruling by the commission that the distribution adopted was unreasonable, and in *Texas & P. R. Co. v. American Tie & Timber Co.*, (1914) 234 U. S. 138, 58 L. Ed. 1255, 34 S. C. R. 885, where a similar lack of hospitality was shown to a complaint against the refusal to accept a shipment of oak railway cross ties for a point beyond the initial carrier's line when the dispute was

The question whether a prosecution for discrimination under the Interstate Commerce Act would lie against Canadian corporations operating only in Canada when they had made an arrangement with American carriers whereby through routes and joint rates were established with some connecting carriers and not with others was answered in the affirmative in *United States v. Pacific & A. R. & N. Co.*<sup>11</sup> These connecting carriers included American steamship lines operating between the United States and Alaska and a company owning and operating wharves in Alaska. Under

whether this commodity was included in the filed tariff fixing joint through lumber rates.

The opposite result was reached in *Pennsylvania R. Co. v. International Coal Mining Co.*, (1913) 230 U. S. 184, 57 L. Ed. 1446, 33 S. C. R. 893, commented on in 19 Colum. L. Rev. 68, 81, and 63 U. Pa. L. Rev. 217, in which a shipper was held entitled to come at once to the court to sue for the damages caused by discrimination practiced by violating the published tariffs in charging competitors less than the published rate. The companies had lawfully raised their rates but had departed from the new rates and continued the old as to coal contracted to be sold while the old rates were in force. This was held to be unwarranted and patently so without any action by the commission, since the new rates were approved by the commission and the incidental departures therefrom had not been submitted to it for approval. While the shipper was held to be entitled to sue without preliminary action by the commission, his judgment for the difference between the published rate charged him and the lower rate charged others was set aside, on the ground that the act allowed him the actual damages suffered but not a participation in the unlawful rebates granted his competitors. On the denial of damages measured by this discrepancy, Mr. Justice Pitney dissented, insisting that no other measure would usually be practicable and that this is the measure most likely to be adopted by the commission in issuing reparation orders.

This decision was followed in *Morrisdale Coal Co. v. Pennsylvania R. Co.*, (1913) 230 U. S. 304, 57 L. Ed. 1494, 33 S. C. R. 938, with respect to discrimination produced by granting haulage and trackage allowances to competitors who in fact did not perform such services. As the railroad hauled for them as well as for the plaintiffs, its allowance was held a mere rebate which under no circumstances would be lawful and which therefore did not inquire preliminary investigation by the commission.

For consideration of various aspects of the judicial enforcement of rights acquired under the Interstate Commerce Act and its amendments, see J. Newton Baker, "The Commerce Court—Its Origin, Its Powers and Its Judges," 20 Yale L. J. 555; Henry Wolf Bicklè, "Jurisdiction of Certain Cases Arising Under the Interstate Commerce Act," 60 U. Pa. L. Rev. 1; George W. Kirchwey, "The Interstate Commerce Commission and the Judicial Enforcement of the Act to Regulate Commerce," 14 Colum. L. Rev. 211; and notes in 2 Calif. L. Rev. 154 on the judicial enforcement of reparation orders; in 14 Colum. L. Rev. 512, 539, on the recovery of damages under the Interstate Commerce Act; in 25 Harv. L. Rev. 292 on the power of state courts to entertain suits by carriers to recover difference between the scheduled rate and the rate charged; in 26 Harv. L. Rev. 665 on denying reparation because of laches; in 10 Mich. L. Rev. 232 on the jurisdiction of the Commerce Court; in 12 Mich. L. Rev. 135 on whether an action is one arising under the Interstate Commerce Act.

<sup>11</sup>(1913) 228 U. S. 87, 57 L. Ed. 742, 31 S. C. R. 443.



these facts the court held that the Canadian companies were in a conspiracy to exercise control over transportation in the United States and were therefore amenable to our laws, both criminal and civil.<sup>12</sup>

While it is not clear that the issue in *United States v. Union Stock Yard & Transit Co.*<sup>13</sup> was more than one of statutory construction, Mr. Justice Day, in holding that the Interstate Commerce Act, the Elkins Act and the Hepburn Act apply to a stockyard company with tracks and other facilities for transferring cars from the trunk-line railroads to the yards, observed that it does not matter that the service is performed wholly in one state if it is a part of interstate carriage nor that the performance of the service is distributed among different corporations having common ownership in a holding company. In characterizing the situation he said:

"Together, these companies, as to freight which is being carried in interstate commerce, engage in transportation within the meaning of the act, and perform services as a railroad when they take the freight delivered at the stock yards, load it upon cars, and transport it for a substantial distance upon its journey in interstate commerce, under a through rate and bill furnished by the trunk line carrier, or receive it while it is still in progress in interstate

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<sup>12</sup>The question whether the jurisdiction of the Interstate Commerce Commission had been extended by Congress to Alaska was answered in the affirmative in *Interstate Commerce Commission v. United States*, (1912) 224 U. S. 474, 56 L. Ed. 849, 32 S. C. R. 556. The original act applied to transportation "from one place in a territory to another place in the same territory." The commission, however, in declining to entertain jurisdiction of a petition to compel an Alaska railroad to file tariffs and establish joint through rates with steamships, had gone on the ground that the word "territory" referred only to "organized territory," of which the chief and determining feature "is a local legislature, as distinguished from a territory having a more rudimentary and less autonomous form of government which it considered Alaska possessed." Mr. Justice McKenna did not controvert the major premise but denied the truth of the minor one, referring to previous decisions to the effect that Alaska is an organized territory notwithstanding the absence of a local legislature. Another ground of the commission's refusal to act was that the Act of May 14, 1898, which first authorized the construction of railroads in Alaska, provides that the rates shall be posted in accordance with the provisions of the Interstate Commerce Act of 1887, "and such rates shall be subject to revision and modification by the secretary of the interior," thereby, it was contended, excluding the operation of other provisions of the Act of 1887 and excluding control by the commission. This was answered by pointing out that the commission was not given power to prescribe rates until the Hepburn Act of June 29, 1906, which, it was declared, "entirely superseded the minor authority which had been conferred upon the secretary of the interior." A mandamus was granted to compel the commission to take jurisdiction.

<sup>13</sup>(1912) 226 U. S. 286, 57 L. Ed. 226, 33 S. C. R. 83. The decision in the court below is considered in 25 Harv. L. Rev. 741.

commerce upon a through rate which includes the terminal services rendered by the two companies, and complete its delivery to the consignee. They are common carriers because they are made such by the terms of their charters, hold themselves out as such, and constantly act in that capacity, and because they are so treated by the great railroad systems which use them."<sup>14</sup>

The stockyard company had leased its tracks to a railroad company which paid as rental a proportion of the profits. Both companies were owned by a holding company. Both were held to be interstate carriers. A contract between the stockyard company and a packing company by which the latter was paid \$50,000 for erecting a plant adjacent to the stockyards and for agreeing to buy only stock moving through the yard or to pay regular charges on stock not so bought was held to be an unlawful discrimination forbidden by the acts of Congress.<sup>15</sup>

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<sup>14</sup>(1912) 226 U. S. 286, 304-305, 57 L. Ed. 226, 33 S. C. R. 83.

<sup>15</sup>Other issues as to whether payments or allowances by carriers to shippers for alleged services rendered amount to unlawful preferences or rebates were considered in three cases.

In *United States v. Baltimore & Ohio R. Co.*, (1913) 231 U. S. 274, 58 L. Ed. 218, 34 S. C. R. 75, a reasonable allowance by a carrier to sugar refineries within a ten-mile free lighterage zone for maintenance of a terminal within that zone and for lightering between that terminal and the rail terminal was held a proper payment for facilities in aid of transportation and not an illegal preference or discrimination on account of the failure to pay a similar compensation to refineries outside that ten-mile zone who are not entitled to free lighterage. The disadvantage of the latter refineries was said to be one arising out of their disadvantageous location which would still exist if the carrier performed all the duties within the free lighterage zone instead of hiring others to do part of them.

In *Interstate Commerce Commission v. Diffenbaugh*, (1911) 222 U. S. 42, 56 L. Ed. 83, 32 S. C. R. 22, considered in 25 Harv. L. Rev. 456, 478, it was held not to be a preference for a carrier to allow the owner of an elevator a reasonable compensation for the cost of transferring grain through his elevator, when such elevator facilities enable the carrier to keep its cars from being sent beyond the terminus of its lines and to compete with other carriers having through lines from grain fields to eastern markets. The commission's orders to cease these payments were sustained as applied to grain kept in the elevator more than ten days before being reshipped, but not as to grain retained less than that time which belonged to the owner and was weighed and graded by him while in his elevator. This advantage which the elevator owner might enjoy was said not to be an undue preference or discrimination so long as the payment by the carrier is no more than reasonable compensation for the necessary elevator service. Justices McKenna and Hughes, in dissenting insisted that the weighing and grading are no part of transportation and that for this separate business no compensation may be given.

*Union Pacific R. Co. v. Updike Grain Co.*, (1911) 222 U. S. 215, 56 L. Ed. 171, 32 S. C. R. 39, held that the carrier may not make its payment to an elevator conditional on unreasonable requirements as to return of the empty cars when under the circumstances disclosed this would discriminate in favor of certain shippers against others to whom the same requirements would be less onerous.

The "long and short haul" clause of the original Interstate Commerce Act of 1887 forbade interstate carriers to charge greater compensation for transportation, "under substantially similar circumstances and conditions" for a shorter than for a longer haul over the same route. This was amended by the Act of June 18, 1910, by omitting the qualification "under substantially similar circumstances and conditions" and by vesting power in the Interstate Commerce Commission to authorize greater charges for a shorter than for a longer haul. The *Intermountain Rate Cases* (*United States v. Atchison, T. & S. F. R. Co.*)<sup>16</sup> involved action by the commission refusing to allow carriers to continue the existing rates from ocean to interior points which were higher than the rates for the same distance as a part of ocean to ocean traffic, but sanctioning certain modifications prescribed by the commission. A contention that the specific action of the commission took property without due process was answered by pointing out that it had already been held that "a general enforcement of the long and short haul clause would not be repugnant to the Constitution." The objection that the failure of Congress to specify the circumstances under which the commission might relax the prohibition of the statute makes it unconstitutional as a delegation of legislative power was said to challenge every decided case since the act of 1887. "The provisions as to undue preference and discrimination," remarked Chief Justice White, "while involving, of course, a certain latitude of judgment and discretion, are no more undefined or uncertain in the section as amended than they have been from the beginning." In characteristic vein he advanced the following argument to show that the contention of the carrier is self-destructive:

"How can it otherwise be since the argument as applied to the case before us is this: that the authority in question was validly delegated so long as it was lodged in carriers, but ceased to be susceptible of delegation the instant it was taken from the carriers for the purpose of being lodged in a public administrative body? Indeed, when it is considered that, in last analysis the argument is advanced to sustain the right of carriers to exert the public power which it is insisted is not susceptible of delegation, it is apparent that the contention is self-contradictory, since it reduces

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<sup>16</sup>(1912) 234 U. S. 476, 58 L. Ed. 1408, 34 S. C. R. 986. See 2 Calif. L. Rev. 491, 28 Harv. L. Rev. 110, and 9 Ill. L. Rev. 276. The decision of the same case in the Commerce Court is discussed in Jay Newton Baker, "The Fourth Section, or the Long and Short Haul," 21 Yale L. J. 278.

itself to an effort to sustain the right to delegate a power by contending that the power is not capable of being delegated."<sup>17</sup>

This case was followed in *United States v. Union Pacific R. Co.*<sup>18</sup> decided on the same day. The decisions were unanimous but were reached only after rearguments.<sup>19</sup>

The original Interstate Commerce Act forbade interstate carriers to receive from any person "a greater or less compensation" for any transportation than that demanded of others for a like and contemporaneous service. The Hepburn Act of 1906 changed this so as to forbid "a greater or less or different compensation." In *Louisville & Nashville R. Co. v. Mottley*<sup>20</sup> this language was held to render illegal the further fulfilment of a promise made by an interstate carrier in 1871 as part of a settlement of a claim for personal injuries to give to the claimant an annual pass during the remainder of his life.<sup>21</sup> In *Chicago, I. & L. R. Co. v. United States*<sup>22</sup> the same language was construed to forbid the issuing of passes in payment of advertising. The operation of the statute in the latter case was on an agreement made after its passage and no due-process issue appears to have been raised. The company placed some reliance upon the fact that the Indiana statute under which it was incorporated permitted passes in payment for advertising, but Mr. Justice Harlan answered that since the transactions in question were interstate the acts of Congress applicable thereto were paramount and no conflicting state statute was of any avail. In the *Mottley Case* it was urged that it is a denial of due process for Congress to make illegal a contract valid when made, but Mr. Justice Harlan answered that all such contracts are subject to the future exercise of the legitimate powers

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<sup>17</sup>(1912) 234 U. S. 476, 486, 58 L. Ed. 1408, 34 S. C. R. 986.

<sup>18</sup>(1912) 234 U. S. 495, 58 L. Ed. 1426, 34 S. C. R. 995.

<sup>19</sup>For a discussion of the application of the principle of the separation of powers to the authority delegated to the Interstate Commerce Commission, see Paca Oberlin, "Authorizing a Federal Commission to Fix Rates is not a Delegation of Congressional Legislative Power in the Constitutional Sense," 73 Cent. L. J. III.

<sup>20</sup>(1911) 219 U. S. 467, 55 L. Ed. 297, 31 S. C. R. 265. See 9 Mich. L. Rev. 615. The issue between the parties was before the Supreme Court previously in *Louisville & N. R. Co. v. Mottley*, (1908) 211 U. S. 149, 53 L. Ed. 126, 29 S. C. R. 42, in which a suit to compel the specific performance of the agreement to give the pass was held not to be within the jurisdiction of the federal courts.

<sup>21</sup>In 1 Va. L. Rev. 561, 568, is a discussion of a state decision requiring a railroad to pay reasonable compensation for a right of way after an agreement to give a pass in compensation therefor has been rendered invalid by statute.

<sup>22</sup>(1911) 219 U. S. 486, 55 L. Ed. 305, 31 S. C. R. 272. A state decision on a state statute to the same effect is considered in 24 Harv. L. Rev. 59.

of Congress over interstate commerce, since any other principle would put it in the power of individuals by contracts between themselves in anticipation of future legislation to "render of no avail the exercise by Congress, to the full extent authorized by the constitution, of its power to regulate commerce."<sup>23</sup>

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<sup>23</sup>Several cases involved the question whether the differences of treatment complained of were unlawful discriminations or preferences under the applicable statutes. Three cases sustained the Interstate Commerce Commission in commands to put an end to discriminations found objectionable. *Interstate Commerce Commission v. Baltimore & Ohio R. Co.*, (1912) 225 U. S. 326, 56 L. Ed. 1107, 32 S. C. R. 742, involved lower rates on coal intended for railroad consumption than on other coal. The court thought that the differences with respect to facilities for delivery do not make the traffic dissimilar in circumstances and conditions within the meaning of the act of 1887. *The Los Angeles Switching Case*, (1914) 234 U. S. 294, 58 L. Ed. 1319, 34 S. C. R. 814, commented on in 3 Calif. L. Rev. 50, held it unjustifiable to impose added charges for delivering cars to industrial spur tracks when no extra charge is made for delivery to team tracks and freight sheds. *Interstate Commerce Commission v. Delaware, L. & W. R. Co.*, (1911) 220 U. S. 235, 55 L. Ed. 448, 31 S. C. R. 392, considered in 11 Colum. L. Rev. 574 and 24 Harv. L. Rev. 669, condemned the refusal of the carrier to apply its carload rates to carload lots of the goods of several owners assembled by a shipping agent.

In two cases in which action brought by a shipper was decided in favor of the carrier, the underlying ground of decision was that victory for the shipper would result in sanctioning a preference. *Chicago & Alton R. Co. v. Kirby*, (1912) 225 U. S. 155, 56 L. Ed. 1033, 33 S. C. R. 648, was an action for failure to fulfil a special contract to expedite a shipment of horses, in which judgment for the carrier was affirmed on the ground that under the Elkins Act of February 19, 1903, this was a service for which a special higher rate might be charged, and the shipper in asking for this special service at regular rates was seeking a discrimination in his favor. The same case in the court below is discussed in 18 Va. L. Reg. 228. A shipper who complained that the agent of the carrier quoted him a lower rate than that duly posted and thereby caused him loss when he was compelled to pay the posted rates was sent away comfortless in *Illinois Central R. Co. v. Henderson Elevator Co.*, (1913) 226 U. S. 441, 57 L. Ed. 290, 33 S. C. R. 176. A state decision to the same effect is noticed in 27 Harv. L. Rev. 83. In 27 Harv. L. Rev. 177 is a note on a decision that the intending shipper may refuse to ship and recover damages for the misquoting of the rate.

A contract to ship at reduced rates the materials of a construction company engaged in work for the carrier was held lawful in *Santa Fe, P. & P. R. Co. v. Grant Brothers Construction Co.*, (1913) 228 U. S. 177, 57 L. Ed. 787, 33 S. C. R. 474, when entered into in good faith as part of the contract for the construction work. Such a shipment was held to be not in the course of the railroad's duty as common carrier, and a contract limiting liability for loss occasioned by the carrier's negligence was sustained.

An instance of discrimination by extending credit to some shippers but not to others is noted in 27 Harv. L. Rev. 754. The question of what is a continuous shipment under the Elkins Act is discussed in 10 Mich. L. Rev. 55. A case holding that cars owned by a shipper must be included in determining the distribution of cars among shippers is treated in 10 Colum. L. Rev. 256, 261.

One of the provisions of the Hepburn Act of June 29, 1906, brought under the jurisdiction of the Interstate Commerce Commission any corporation or person engaged in the interstate transportation of oil by means of pipe lines and declared that such corporations or persons should be considered and held to be common carriers within the meaning and purpose of the act. Under authority of the statute the Interstate Commerce Commission ordered a number of oil companies operating pipe lines to file schedules of their rates and charges for transportation of oil. The validity of these orders came before the court in *The Pipe Line Cases*.<sup>24</sup> One of the companies carried no oil except from its own wells to its own refineries and was held not to fall "within the description of the act, the transportation being merely an incident to use at the end." "It would," observed Mr. Justice Holmes, "be a perversion of language, considering the sense in which it is used in the statute, to say that a man was engaged in transportation whenever he pumped a pail of water from his well to his house." Chief Justice White in a separate concurring opinion declared that "the business thus carried on is transportation in interstate commerce within the statute" but that "it would be impossible to make the statute applicable to it without violating the due-process clause of the fifth amendment, since to apply it would necessarily amount to a taking of the property of the company without compensation." Congress, he insisted, cannot turn a purely private business into a public business except by the exercise of the right of eminent domain.

The other companies carried no oil except that which they derived from their own wells or purchased from owners of other wells. As Mr. Justice Holmes put it, "they carry everybody's oil to market, although they compel outsiders to sell it before taking it into their pipes." This, he added, made them common carriers in everything but form, and Congress may require those who are common carriers in substance to become so in form. On the commerce question he observed:

"That the transportation is commerce among the states we think clear. That conception cannot be made wholly dependent upon technical questions of title, and the fact that the oils transported belonged to the owner of the pipe line is not conclusive

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<sup>24</sup>(1914) 234 U. S. 548, 58 L. Ed. 1459, 34 S. C. R. 956. See 2 Calif. L. Rev. 494, 14 Colum. L. Rev. 662, 687, 28 Harv. L. Rev. 84, 104, and 13 Mich. L. Rev. 159. The case in the court below is considered in 26 Harv. L. Rev. 630, 655.

against the transportation being such commerce. . . . The situation that we have described would make it illusory to deny the title of commerce to such transportation, beginning in purchase and ending in sale, for the same reasons that make it transportation within the act."<sup>25</sup>

On the due-process question Mr. Justice McKenna vigorously disagreed in a manner prophetically reminiscent of his later passionate dissent in the cases sustaining the regulation of rents.<sup>26</sup> One or two of the complaining companies, he recognized, might for special reasons have been common carriers before being declared to be so by Act of Congress, but he refrained from going into details since he was without the power of decision. He objected strenuously to the idea that a person using his private property to carry his own products may be compelled to carry the products of others at prices fixed by governmental authority. As against the statement of Mr. Justice Holmes that the oil companies used their ownership of pipe lines to require other producers of oil to sell to them on practically their own terms, thus by duress making themselves master of the situation, Mr. Justice McKenna declared:

"This is the charge. The facts of the case do not sustain it except as they exhibit the advantages of the possession of property which others do not possess. Must it be shared by those others for that reason? The conception of property is exclusiveness, the rights of exclusive possession, enjoyment, and disposition. Take away these rights and you take away all that there is of property. Take away any of them, force a participation in any of them, and you take property to that extent. . . . The employment of one's wealth to construct or purchase facilities for one's business greater than others possess constitutes no monopoly that does not appertain to all property. Such facilities may give advantages, and, it may be, power; so does all property and in proportion to its extent. . . . If the owner of a small oil well may be given rights in the facilities of the appellee companies, why may not the owner of a small business be given rights in the facilities of a larger business, if Congress sees fit to say that the public welfare requires the gift? Can any privilege be claimed for oil that cannot be claimed for other commodities?

"There is quite a body of opinion which considers the individual ownership of property economically and politically wrong and insists upon a community of all that is profit-bearing. This opinion has its cause, among other causes, in the power—may I

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<sup>25</sup>(1914) 234 U. S. 548, 560, 58 L. Ed. 1459, 34 S. C. R. 956.

<sup>26</sup>*Block v. Hirsh*, (1921) 256 U. S. 135, 65 L. Ed. 865, 41 S. C. R. 458; *Marcus Brown Holding Co. v. Feldman*, (1921) 256 U. S. 170, 65 L. Ed. 877, 41 S. C. R. 465.

say the duress?—of wealth. If it accumulates 51 per cent of political power, may it put its conviction into law and justify the law by the advancement of the public welfare by destroying the monopoly and mastery of individual ownership?"<sup>27</sup>

Though Mr. Justice Holmes had declared that the Hepburn Act does not compel the pipe lines to continue in operation, but merely requires them not to continue except as common carriers, Mr. Justice McKenna referred to the commodities clause of the Hepburn Act which forbids common carriers to carry their own products and insisted that the result of sustaining that clause and of reaching the present decision is that "by legal circumlocution property legally devoted to the use of its owners is forbidden such use and devoted wholly to the use of others." To this he added the curt comment: "A queer outcome."<sup>28</sup>

After holding in *United States v. Adams Express Co.*<sup>29</sup> that Congress by the provision in the Hepburn Act of June 29, 1906, that "the term 'common carrier', as used in this act, shall include express companies and sleeping car companies" had extended to unincorporated express companies the provisions of the original act of 1887 for criminal punishment of carriers indulging in unlawful discriminations, Mr. Justice Holmes referred to a possible constitutional issue as follows:

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<sup>27</sup>(1914) 234 U. S. 548, 571-573, 58 L. Ed. 1459, 34 S. C. R. 458.

<sup>28</sup>Orders of the Interstate Commerce Commission reducing rates were sustained in *Interstate Commerce Commission v. Union Pacific R. Co.*, (1912) 222 U. S. 541, 56 L. Ed. 308, 32 S. C. R. 108, and *Interstate Commerce Commission v. Louisville & Nashville R. Co.*, (1913) 227 U. S. 88, 57 L. Ed. 431, 33 S. C. R. 185. Orders reducing rates were set aside in *Florida East Coast R. Co. v. United States*, (1914) 234 U. S. 167, 58 L. Ed. 1267, 34 S. C. R. 867, because made without evidence in support, and in *Southern Pacific Co. v. Interstate Commerce Commission*, (1911) 219 U. S. 433, 55 L. Ed. 283, 31 S. C. R. 288, commented on in 24 Harv. L. Rev. 581, because based on the erroneous assumption that the commission has jurisdiction to protect lumber interests from a change in rates and not because the new rates were found unreasonable.

*Kansas City Southern R. Co. v. C. H. Albers Commission Co.*, (1912) 223 U. S. 573, 56 L. Ed. 556, 32 S. C. R. 316, held that under the Interstate Commerce Acts of 1887 and 1889 rates are duly established by being filed with the Interstate Commerce Commission and kept open to shippers in the office of the company even though not posted in a public place as the law requires. In the absence of an established joint rate over connecting lines the authorized rate is the sum of the two separate rates of the two roads, and any agreement with a shipper to charge less is void.

An order of the commission permitting consignors of pre-cooled shipments to ice cars at their warehouses before shipment when the roads failed to furnish the service at substantially equal cost was affirmed in *Atchison, T. & S. F. R. Co. v. United States*, (1914) 232 U. S. 199, 58 L. Ed. 568, 34 S. C. R. 291, commented on in 9 Ill. L. Rev. 48.

<sup>29</sup>(1913) 229 U. S. 381, 57 L. Ed. 1237, 33 S. C. R. 878.



"The power of Congress hardly is denied. The constitutionality of the statute as against corporations is established . . . , and no reason is suggested why Congress has not equal power to charge the partnership assets with a liability, and to personify the company so far as to collect a fine by a proceeding against it by the company name. That is what we believe that Congress intended to do. It is to be observed that the structure of the company under the laws of New York is such that a judgment against it binds only the joint property, . . . and that it has other characteristics of separate being . . ."<sup>30</sup>

The constitutionality of what is known as the Commodities Clause of the Hepburn Act which before 1910 had been sustained—after being warped in its interpretation so as not to prohibit interstate carriers from transporting certain commodities unless they owned or were interested in the ownership of them at the time of transportation—was reaffirmed in *Delaware, L. & W. R. Co. v. United States*.<sup>31</sup> In earlier cases the railroads had been transporting commodities owned by them from the mines which they also owned. In the principal case the road was carrying hay which it acquired in Buffalo to a mine which it owned in Scranton. Mr. Justice Lamar said that the act applies to transportation from market to mine as well as from mine to market and that as to both it is a regulation of interstate commerce and not a violation of the due-process clause of the fifth amendment. In support he added:

"The commodity clause does not take property, nor does it arbitrarily deprive the company of a right of property. The statute deals with railroad companies as public carriers, and the fact that they may also engage in private business does not compel Congress to legislate concerning them as carriers so as not to interfere with them as miners or merchants. If such carrier hauls for the public and also for its own private purposes, there is an opportunity to discriminate in favor of itself against other shippers in the rate charged, the facility furnished, or the quality of the service rendered. The commodity clause was not an unreasonable and arbitrary prohibition against a railroad company transporting its own useful property, but a constitutional exercise of govern-

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<sup>30</sup>*Ibid.*, 390. In *Omaha & C. B. Street R. Co. v. Interstate Commerce Commission*, (1931) 230 U. S. 324, 57 L. Ed. 1501, 33 S. C. R. 890, it was held that the word "railroads" in the Interstate Commerce Act of 1887 does not include street railways, since they are not within the mischief which the act sought to remedy and since many of the provisions of the act are quite inapplicable to them. In 10 Mich. L. Rev. 498 is a note to the same case in the court below. The topic is considered in Borden D. Whiting, "Street Railways and the Interstate Commerce Act," 10 Colum. L. Rev. 450.

<sup>31</sup>(1913) 231 U. S. 363, 58 L. Ed. 269, 34 S. C. R. 65.

mental power intended to cure or prevent the evils that might result if, in hauling goods in or out, the company occupied the dual and inconsistent position of public carrier and private shipper."<sup>32</sup>

Aftermaths of the earlier Commodity Cases came before the court in *United States v. Lehigh Valley R. Co.*<sup>33</sup> and *United States v. Erie Railroad Co.*<sup>34</sup> which held that the statute forbids the roads to transport coal owned by a corporation which is so completely owned and managed by the roads as to be an alter ego of them. While the constitutional issue was not mentioned, the necessary inference is that the act so interpreted is constitutional.<sup>35</sup>

The so-called Carmack Amendment to the Hepburn Act of 1906 required interstate carriers receiving property for interstate transportation to issue a receipt and bill of lading therefor and provided that the initial carrier should be liable for any loss, damage or injury to the property caused by it or by any succeeding connecting carrier, such initial carrier being given a right of reimbursement against the carrier on whose line the injury occurs.

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<sup>32</sup>*Ibid.*, 370.

<sup>33</sup>(1911) 220 U. S. 257, 55 L. Ed. 458, 31 S. C. R. 387. See 24 Harv. L. Rev. 672.

<sup>34</sup>(1911) 220 U. S. 275, 55 L. Ed. 464, 31 S. C. R. 392.

<sup>35</sup>The Commodities Clause excludes from its operation the shipment of lumber which the carrier owns. Three cases have to do with questions of discrimination arising from situations in which roads carry both their own lumber and that of others. *Fourche River Lumber Co. v. Bryant Lumber Co.*, (1913) 230 U. S. 316, 57 L. Ed. 1498, 33 S. C. R. 887, held that a railroad company the stock of which is owned by a lumber company is entitled to retain its proportion of interstate freight rates received for shipments made over its road by another lumber company, notwithstanding an agreement between the two lumber companies that there should be no discrimination against either in the matter of freight rates, since otherwise the second lumber company would in effect receive a rebate from the railroad company in violation of the Interstate Commerce Act.

In *The Tap Line Cases* (*United States v. Louisiana & P. R. Co.*), (1913) 234 U. S. 1, 58 L. Ed. 1185, 34 S. C. R. 741, commented on in 27 Harv. L. Rev. 579, 586, the court reversed the Interstate Commerce Commission in ordering through carriers to make no allowance to branch lines owned by lumber companies for the transportation of their own products over the branch lines. Such lines were found to be common carriers carrying the products of others as well as of their owners, and their owners would therefore be discriminated against as shippers if they received no allowance for carriage over their own line and furnished that transportation without remuneration as carrier while other shippers paid for the entire haul of their products no more than the owners of the lines paid. In effect the commission was requiring the owners of the tap lines to charge themselves as shippers as much for the main haul as they charged other shippers for the combined haul. The Supreme Court held that as carriers they were entitled to get as much for hauling their own products as for hauling those of others. *The Tap Line Cases* were followed in *United States v. Butler County R. Co.*, (1914) 234 U. S. 29, 58 L. Ed. 1196, 34 S. C. R. 748, decided on the same day.

The amendment further provides that no contract, receipt or rule shall exempt the initial carrier from the liability thus imposed by the statute and that nothing in the section shall deprive the holder of a bill of lading of any right under existing law. In *Atlantic Coast Line R. Co. v. Riverside Mills*<sup>36</sup> this imposition of liability on the initial carrier for the fault of a succeeding carrier was sustained and a stipulation in the bill of lading against such liability was declared invalid as against the complaint that the enforcement of the statute deprives the initial carrier of liberty of contract in violation of the fifth amendment. Mr. Justice Lurton reminded the company that there is no such thing as absolute freedom of contract, that contracts against public policy are invalid at common law, and that the power to regulate commerce includes power to impose on interstate carriers duties reasonably adapted to promote the welfare of commerce. After rehearsing the conditions out of which the statute arose and the hardship on shippers over several connecting lines if they must discover and sue the particular carrier in fault, the learned Justice laid down that the regulation complained of imposes no unreasonable burden on the receiving carrier, since that carrier collects the freight for the entire transportation, has frequent settlements of traffic balances with connecting carriers, has facilities for locating the carrier actually in fault which the shipper lacks, and therefore enjoys a reasonable security for reimbursement. The complaint that a carrier might be held liable for the fault of a succeeding carrier which it had no power to select or reject as participant in the through carriage was put to one side as not applicable to the present case in which, for all that appeared, the initial carrier had voluntarily made its arrangements with the succeeding carrier in fault.<sup>37</sup>

The *Riverside Mills Case* was followed in *Louisville & Nashville R. Co. v. Scott*,<sup>38</sup> decided the same day, and in *Galveston, H. & S. A. R. Co. v. Wallace*,<sup>39</sup> decided a year later. In the latter

<sup>36</sup>(1911) 219 U. S. 186, 55 L. Ed. 167, 31 S. C. R. 164. See 1 Calif. L. Rev. 269, 11 Colum. L. Rev. 380, and 24 Harv. L. Rev. 404.

<sup>37</sup>For general articles on the problem raised by the *Riverside Mills Case*, see Frederick H. Cooke, "The Power of Congress and of the States Respectively, to Regulate the Conduct and Liability of Carriers," 10 Colum. L. Rev. 35; Edwin C. Goddard, "The Liability of the Common Carriers As Determined by Recent Decisions of the Supreme Court," 15 Colum. L. Rev. 399, 475; and Jacob S. New, "The Liability of the Initial Carrier Under the Interstate Commerce Act," 73 Cent. L. J. 4.

A case holding the initial carrier liable for a fire in a warehouse at the destination of the shipment is discussed in 11 Mich. L. Rev. 255.

<sup>38</sup>(1911) 219 U. S. 209, 55 L. Ed. 183, 31 S. C. R. 171.

<sup>39</sup>(1912) 223 U. S. 481, 56 L. Ed. 516, 32 S. C. R. 205. See 1 Calif. L. Rev. 269.

case it was held that the act applies to a failure to deliver although the shipper has not proved negligence. The act in effect makes later carriers the agents of the initial carrier, and failure to deliver is presumptively due to negligence. If it was "due to the act of God, the public enemy, or some other cause against which" the initial carrier "might lawfully contract, it was for the carrier to bring itself within such exception." The *Wallace Case* held also that the liability imposed by the federal statute may be enforced in a state court.<sup>40</sup>

The question reserved in the *Riverside Mills Case* was raised again in *Norfolk & Western R. C. v. Dixie Tobacco Co.*<sup>41</sup> in which the shipment involved was over a route partly by sea which was chosen by the shipper and was a different one from that which the initial carrier would normally have adopted. The railroad had no through route or rate established with the line of steamers. It argued that "as it was bound to accept goods destined beyond its own line for delivery to the next carrier, and was required by the statute to give a through bill of lading, if, on such compulsory acceptance, it is made answerable for damages done by others, its property is taken without due process of law." Mr. Justice Holmes contented himself with answering that in the *Riverside Case* there "was the same stipulation" against liability beyond its own lines "in the bill of lading, and the supposed through routes were only presumed;" that in the *Wallace Case* "the carrier is spoken of as voluntarily accepting goods for a point beyond its line, but there, too, there was the same attempt to limit liability, and in the present case the acceptance was voluntary in the same degree as in that," so that "there is no substantial distinction between the earlier decisions and this."<sup>42</sup>

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<sup>40</sup>In 6 Ill. L. Rev. 133 is a note on the jurisdiction of the state courts to enforce liability based on the Carmack Amendment.

<sup>41</sup>(1913) 228 U. S. 593, 57 L. Ed. 980, 33 S. C. R. 609.

<sup>42</sup>In a series of cases the prohibition of the Carmack Amendment against any contract or stipulation exempting the initial carrier from liability for loss, damage or injury was construed not to prohibit or make unlawful a contract or stipulation as to the agreed value of the goods for the purpose of obtaining a choice of rates based on the value. This interpretation was first put forth in *Adams Express Co. v. Croninger*, (1913) 226 U. S. 491, 57 L. Ed. 314, 33 S. C. R. 148, which held also that the Carmack Amendment covers the question of the liability for interstate shipments and precludes the further application of state law regulating such liability. The stipulation limiting recovery to the agreed value was unlawful by the state law but was held not to be forbidden by the Carmack Amendment. It was not, however, explicitly approved by the Carmack Amendment. In holding the stipulation valid under federal law, the Supreme Court applied its views of what it thought the

The original Interstate Commerce Act of 1887 authorized the Interstate Commerce Commission to require interstate carriers to

common law ought to be, so that the controlling federal law is not an act of Congress, but the Supreme Court's knowledge of the principles of common law, which knowledge as contrasted with the contradictory knowledge of the state court became the knowledge to apply because the subject matter had passed from state to federal authority. The Croninger Case is discussed in 1 Georgetown L. J. 169, 26 Harv. L. Rev. 456, 8 Ill. L. Rev. 123, 11 Mich. L. Rev. 460, 61 U. Pa. L. Rev. 501, and 18 Va. L. Reg. 778. The issue whether the carrier's liability is governed by state or federal law is dealt with in 60 U. Pa. L. Rev. 39 and 18 Va. L. Reg. 705. The question whether a shipper who undervalues the goods shipped is guilty of a violation of the federal statute is considered in 5 Ill. L. Rev. 240, 311, 372.

Kansas City Southern Ry. Co. v. Carl, (1913) 227 U. S. 639, 57 L. Ed. 683, 33 S. C. R. 391, considered in 11 Mich. L. Rev. 588, follows the Croninger Case in holding that the Carmack Amendment does not forbid or render unlawful a stipulation as to an agreed valuation for the purpose of determining the applicable rate and in applying the rule of the federal courts that such stipulations are lawful and that a limitation of the recovery to the agreed valuation is not a release of the carrier for a part of the loss due to negligence. The apparent impasse is apparently avoided by saying that "the ground upon which such a declared or agreed value is upheld is that of estoppel." In this case Justices Hughes and Pitney dissented, but it is to be assumed that their difficulty was with regard to the question whether the principle was applicable to the particular stipulation rather than to the principle itself, since they had concurred in the Croninger Case. Both cases were decided only after a reargument. The Carl Case was a suit against the ultimate carrier instrumental in causing the injury; the stipulation was imposed by the initial carrier, but it stated that it was for the benefit of succeeding carriers and the Supreme Court declared that any lawful stipulation entered into by the initial carrier enures to the benefit of succeeding carriers.

These semi-professed interpretations of the Carmack Amendment are in reality the Supreme Court's ideas of common-law principles of the law of carriers on matters on which the Carmack Amendment is silent. Wells, Fargo & Co. v. Neiman-Marcus Co., (1913) 227 U. S. 469, 57 L. Ed. 600, 33 S. C. R. 267, held that the shipper's acceptance of an express receipt stating that the company "is not to be held liable beyond the sum of \$50, at not exceeding which sum said property is hereby valued, unless a different value is hereinabove stated" is, in the absence of any statement of higher value, equivalent to a declaration that the value does not exceed \$50, and the shipper is estopped from claiming more than that amount. Great Northern R. Co. v. O'Connor, (1914) 232 U. S. 508, 58 L. Ed. 703, 34 S. C. R. 380, held that the carrier was justified in relying upon the signature of the shipper's agent to a bill of lading describing the goods as household goods not exceeding a designated value, and in the absence of special circumstances, was not required to make inquiry as to the value.

In Boston & Maine R. Co. v. Hooker, (1914) 233 U. S. 97, 58 L. Ed. 868, 34 S. C. R. 526, the rule of the previous cases was applied to baggage checked on a passenger's railroad ticket. The check was held to be a sufficient receipt within the requirements of the Carmack Amendment, and the filing and posting of a tariff limiting the liability for lost baggage to \$100 when no higher value is stated and an excess rate paid was found sufficient to estop the passenger from claiming more than \$100 although the lady in question had no actual knowledge of the tariff

make annual reports and vested it with discretion to prescribe the forms for keeping accounts and records. The Hepburn Act of 1906 reiterated this authorization and added a prohibition against keeping accounts in other forms than those specified by the commission. It also extended the requirements to carriers transporting passengers and property partly by railroad and partly by water. In *Interstate Commerce Commission v. Goodrich Transit Co.*<sup>43</sup> certain carriers objected that the requirements of the commission exceeded the constitutional powers of Congress because they imposed the duty of giving information as to purely intra-state business. Mr. Justice Day answered that knowledge of the whole business of interstate carriers is essential to the adequate regulation of their interstate business and that the requiring of information concerning intra-state business is not a regulation of that business. The contention that Congress had unlawfully delegated legislative power to the commission was answered by saying that Congress had laid down the general rule as to the keeping of accounts and vested the commission only with power to fill in details. It was also held that the complainants have no immunity from federal supervision on the ground that Congress has no visitatorial powers over state corporations. While it has no general visitatorial powers it may exercise such powers as are necessary to regulate their interstate business. Justices Lurton and Lamar dissented without opinion.

Still more elaborate complaints against the forms of accounting and reporting required by the Interstate Commerce Commission were held unfounded in *Kansas City Southern Ry. Co. v. United States*<sup>44</sup> by an unanimous court. The major lament was that the

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and neither made, nor was asked to make, any representations as to the value. Mr. Justice Pitney filed an extended and vigorous dissent, in which he insisted that a limitation of liability under such circumstances is opposed to the Supreme Court's reiterated declarations of the common law, is not only not sanctioned by anything in acts of Congress but is opposed to the letter and the spirit of the Carmack Amendment, and is not only not sanctioned by the Interstate Commerce Commission but is covered by an adverse ruling handed down by it. The Supreme Court's decision is discussed in 27 Harv. L. Rev. 737, 755, 9 Ill. L. Rev. 276, and 62 U. Pa. L. Rev. 638. The decision in the court below is considered in 25 Harv. L. Rev. 186 and 10 Mich. L. Rev. 133.

The limitation of the carrier's liability is dealt with in Edmund F. Trabue, "Contract Limitation of Carrier's Liability, State and Federal," 48 Amer. L. Rev. 50; and notes in 9 Mich. L. Rev. 233, and 62 U. Pa. L. Rev. 727.

<sup>43</sup>(1912) 224 U. S. 194, 56 L. Ed. 729, 32 S. C. R. 436.

<sup>44</sup>(1913) 231 U. S. 423, 58 L. Ed. 296, 34 S. C. R. 125. See 27 Harv. L. Rev. 369, 395.

distinctions imposed by the commission between property accounts and operating accounts required the companies to transfer to operating expenses a number of items that properly belonged in the capital accounts. This, it was alleged, was so unreasonable and arbitrary as to constitute an abuse rather than an exercise of the powers conferred. Mr. Justice Pitney pointed out that the validity of the contention depended upon whether the regulations were entirely at odds with fundamental principles of correct accounting. After an elaborate examination he reached the conclusion that the commission was justified in what it had done. The company's contention was characterized as one resting on the unwarrantable assumption that all capital expenditures result in permanent accretion to the property, thus ignoring depreciation. The opinion seems to have the idea that the bookkeeping required would not control the rights of the company with respect to the rates to be charged or the dividends that might be paid but merely required it to set forth the facts as they actually were, though this is not made very explicit. This issue is not treated by Mr. Justice Pitney as a constitutional one, but in one of the briefs it was alleged that the unwarranted transfer of capital expenditures to operating accounts would deprive holders of non-cumulative preferred stock of property without due process of law by denying them dividends to which actually they were entitled. In addition to disagreeing with the analysis indulged in by the company, Mr. Justice Pitney answered that the preferred stockholders were not before the court and that Congress may deal with the carriers as distinct entities without restraint on account of agreements among the stockholders as to the apportionment of profits. The regulations of the commission merely prevent the proceeds of bond issues from being used "to maintain dividend payments *without that fact appearing in the accounts.*" Undoubtedly this will deter the company from making such payments, but "since one of the very purposes of establishing the accounting system is to deter the payment of dividends out of capital, the criticism, upon analysis, bears its own refutation." The decision that the commission had not abused the discretion vested was accompanied by a reaffirmation that the vesting of the discretion is not an unconstitutional delegation of legislative authority.

*(To be continued)*